COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 009820-02**
Arthur W. Favreau (deceased)	Employee
Deborah Favreau	Claimant
Perini/Kiewit/Atkinson	Employer
National Union Fire Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges McCarthy, Costigan and Fabricant)

APPEARANCES
Paul L. Durkee, Esq., for the employee
Mark H. Likoff, Esq., for the insurer

McCARTHY, J. This appeal presents the question of how to coordinate the compensation rate adjustment of § 51A[1] and cost-of-living increases under

[1] General Laws c. 152, § 51A, provides:

> In any claim in which no compensation has been paid prior to the final decision on such claim, said final decision shall take into consideration the compensation provided by statute on the date of the decision, rather than the date of the injury.

§ 34B.[2] In an earlier decision, an administrative judge applied § 51A and ordered that the claimant's § 31 benefits be paid at the rate in effect on the date of that decision, October 9, 2003.[3] As a result the claimant was paid a weekly § 31 benefit of $753.47, representing 66 2/3% of the employee's $1,130.02 average weekly wage. The date of injury/death was April 15, 1998, at which time § 31 benefits were capped at the state average weekly wage of $665.55. The reviewing board summarily affirmed the administrative judge's decision, 18 Mass. Workers' Comp. Rep. 328 (2004), and the insurer then appealed to the Massachusetts Appeals Court. A single justice of that court upheld the determination of the reviewing board.

In the interim, on October 31, 2003, the widow filed a claim seeking ongoing weekly § 31 benefits on the basis that she had not remarried and was not fully self-supporting. The claim came before the same administrative judge, who

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[2] General Laws c. 152, § 34B, provides, in pertinent part:

> October first of each year shall be the review date for the purposes of this section.
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> Any person receiving or entitled to receive benefits under the provisions of section thirty-one or section thirty-four A whose benefits are based on a date of personal injury at least twenty-four months prior to the review date shall have his weekly benefit adjusted, without application, in accordance with the following provisions; provided, however, that no increase in benefits shall be payable which would reduce any benefits the recipient is receiving pursuant to federal social security law.
>
> (a) The director of administration shall determine the percentage change between the average weekly wage in the commonwealth on the date of the injury and the average weekly wage in the commonwealth on the review date. . . .
>
> (b) The death benefit under section thirty-one or the permanent and total disability benefit under section thirty-four A that was being paid prior to any adjustments under this section shall be the base benefit. The base benefit shall be changed on each review date by the percentage change as calculated in paragraph (a); the resulting amount shall be termed the adjusted benefit and is the amount of benefit to be paid on and after the review date.

[3] Denial orders had issued following a § 10A conference on July 23, 2002, so no compensation claimed had been paid prior to the hearing decision.

issued an order dated March 2, 2004 directing payment of weekly § 31 benefits. Cross appeals brought the case to a § 11 hearing de novo on January 6, 2005. In a decision filed June 15, 2005, the judge concluded that the claimant continued to be entitled to receive § 31 benefits, as she was "not fully self-supporting" within the meaning of the statute. The judge ordered the benefits paid at the weekly rate of $753.47 plus cost of living adjustments as provided by § 34B. However, the question arose as to how the cost-of-living increases (COLA) should be calculated, insofar as the § 51A adjustment already increased the claimant's compensation rate beyond that which had been available as of the date of injury/death.

The judge applied the COLA multiplier for the original date of injury to the § 51A rate of compensation awarded in the October 9, 2003 decision. (Dec. 7-8.) The insurer disagreed and its appeal is now before us. For the reasons that follow, we affirm the decision.

We find that the parties both correctly invoke reviewing board decisions on this issue, each of which supports an opposite result. The insurer favors Downey v. Blue Cross/Blue Shield, 7 Mass. Workers' Comp. Rep. 376 (1993); the employee relies on Block v. Newton Nissan, 15 Mass. Workers' Comp. Rep. 143 (2001).[4]

It is quite evident why the insurer prefers Downey. In Downey, we concluded that a § 51A date of decision rate adjustment necessitates changing the operative date for the October 1 COLA adjustment from the date of injury to the date of decision. See footnote 1, supra.

> By the enhancement of weekly benefits under § 34A through the application of § 51A, the base benefit became the rate in effect on the date of the administrative judge's decision. The retroactive COLA due, therefore, must be calculated with the corresponding COLA multipliers operative on that date of decision. While not specifically stated in § 51A, we believe the legislative intent for that result is found in § 35C (in its

[4] Somewhat akin to the Supreme Court addressing conflicts between circuits, we are here called upon to address our internal short circuit.

> second paragraph). See M. G. L. c. 152, § 35C [explicitly changing base benefit date to first date of eligibility for benefits when more than five years post-injury]. To apply the multiplier of the date of injury to the higher rate under § 51A would give the employee an unintended windfall in this case on these unusual facts.

Downey, supra at 382.

The insurer argues that the Downey analysis is directly applicable to the present case. As noted in Downey, the multiplier for the date of decision is smaller than that applicable to the 1998 date of injury/death, thereby yielding a reduced benefit entitlement. Here, however, the widow would not receive *any* COLA adjustment to her § 31 benefit until the October 1, 2004 review date. This is because the decision was filed on October 9, 2003, and the applicable October 1, 2003 COLA multiplier was 1.00, i.e., no adjustment.

On the other hand, the employee's reliance on Block, supra, is similarly understandable. Block also dealt with the two sections involved here, but without regard for the Downey approach.[5] The Block date of injury was the date of death, and we simply applied the § 34B multiplier as of that injury/death date (September 8, 1986) to the § 51A rate available on the date of decision, April 25, 1990.[6] Block did not regard the outcome of this approach as the "windfall" that so troubled us in Downey. Nonetheless, we were not unaware of the possibility of excessive benefit enhancement and we did set the obvious limit to the combined effects of §§ 51A and 34B:

> [T]he result of this calculation [date of death multiplier with date of decision base benefit] will give the widow a weekly benefit that exceeds the current [average weekly wage in the commonwealth, ("SAWW")]. The insurer argues that the administrative judge was correct in ruling that the widow's benefit cannot exceed the SAWW. The employee contends that

[5] We see no distinction that can or should be drawn with a view toward whether the benefits at stake are § 31 death benefits (Block and the present case) or § 34A permanent and total incapacity benefits (Downey).

[6] The parties stipulated to the date of death as the operative date for COLA purposes. We apparently accepted this as correct, and analyzed the case accordingly.

> the judge was wrong and that she is entitled to the benefit determined by the accepted calculation even though it exceeds the SAWW.
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> We agree with the insurer that the widow's weekly benefits cannot exceed the current SAWW. General Laws c. 152 § 31 is clear; it states: "If death results for the injury, the insurer shall pay compensation . . . [t]o the widow . . . a weekly compensation equal to two-thirds of the average weekly wages of the deceased employee, but not more than the average weekly wage in the commonwealth. . . ." In DeFayette v. Gerald E. McNally Constr. Co., 11 Mass. Workers' Comp. Rep. 568 (1997), we addressed the issue of the propriety of weekly benefits exceeding the SAWW, where both § 34B and § 51A apply. Our view on that issue has not changed.
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> > Section 31 of the Act provides for compensation to be paid only up to a maximum weekly compensation rate, one hundred percent of the [SAWW. See also] G. L. c. 152 § 1(10)[7] . . . . [If the widow's position is adopted, t]he result reflects the overlay of the similar obsolescence-avoiding functions of §§ 34B and 51A. It is a [windfall] result we cannot condone, because it is a rate of compensation payment that is unauthorized by the Act. We read the word "maximum" [as appearing in § 1(10)] to mean what it says.

Block, supra at 144-145, quoting DeFayette, supra at 572.

We choose to follow Block. With the applicable SAWW as the upside limit, the fear of a "windfall" is baseless. Indeed, the unfairness of a claimant being *penalized* by the happenstance of a § 51A application – which is mandatory under McLeod's Case, 389 Mass. 431, 435 (1983) – seems an arbitrary and unintended result needing legislative attention. See Betances v. Consolidated Serv. Corp., 11 Mass. Workers' Comp. Rep. 65, 69-70 (1997)(interpreting minimum compensation rate provisions under § 1(11) and § 34 to avoid arbitrary, irrational and unjust result, and to effectuate "evenhanded disposition of benefits"). COLA is an absolute entitlement to recipients of benefits under §§ 34A and 31. It explicitly addresses the erosion of the value of a weekly benefit award by inflation, after at least two years of entitlement have passed. Section

[7] In § 1(10), "Maximum weekly compensation rate" is defined as "one hundred per cent of the average weekly wage in the commonwealth. . . ."

51A, while similar in purpose, is not the same. It also serves to encourage insurers to settle claims without the necessity of full-blown litigation. We do not think that the overlap of the sections presents the type of "double recovery" problem that Downey sought to avoid.

Lastly, we note that Downey's reference to the specific language in § 35C to support its construction of § 51A – which contains no such language – is contrary to conventional rules of statutory interpretation. See Taylor's Case, 44 Mass. App. Ct. 495, 500 (1998)(use of provision elsewhere in c. 152, but not in section under examination, militates against borrowing that provision for use in that section). Had the legislature meant for the COLA multiplier to change, when § 51A also applied to a claim, it certainly knew how to say it. See § 35C, second paragraph ("For the purposes of adjustments to compensation under sections thirty-four B and thirty-five F for employees *subject to this section*, the first date of eligibility for benefits rather than the date of injury shall be used for purposes of computing such supplemental benefits.")(Emphasis added.) That the legislature did not redefine the date of injury for the purposes of calculating cost-of-living adjustments on a § 51A adjusted base benefit can only support our conclusion that Downey was wrongly decided as to this issue.

We therefore affirm the decision, and overturn Downey with regard to its analysis of §§ 34B and 51A. We award an attorney's fee under the provisions of G. L. c. 152, § 13A(6), in the amount of $1,357.64

So ordered.

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William A. McCarthy
Administrative Law Judge

Filed: ***July 12, 2006***

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Patricia A. Costigan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge